86-541

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

UNITED STATES OF AMERICA
PLAINTIFF - RESPONDENTS

and

MICHEAL WALLACE et al.,
INTERVENORS - PETITIONERS

vs.

ALLEGHANY - LUDLUM INDUSTRIES et al.,
DEFENDANT - RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GEORGE C. LONGSHORE
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2104 CITY FEDERAL BLDG
BIRMINGHAM, AL 35203
(205) 328-4602

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QUESTION PRESENTED

Whether a local seniority agreement negotiated between a labor organization and management is subject to veto by a tripartite committee created by a consent decree consisting of government, union and management members in the absence of proof that the seniority system is not bona fide?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

CASE NO. _____

UNITED STATES OF AMERICA
PLAINTIFF - RESPONDENTS

and

MICHEAL WALLACE et al.,
INTERVENORS - PETITIONERS

vs.

ALLEGHANY - LUDLUM INDUSTRIES et al.,
DEFENDANT - RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Michael Wallace, Eric Smith, Alfonzo Frazier, Jr., Betty Stafford, W.P. Kallaher, Jr., Jim Latner on their behalf and on behalf of a class of persons similarly situated petition for a writ of certiorari to enable this Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit in U.S.A., et al.; Michael Wallace, et al., v. Alleghany Ludlum Industries, et al Cases No. 35-7530 and 85-7661 entered on June 20, 1986 with a mandate issued on July, 19, 1986.

OPINIONS BELOW

The district court's decision is appended hereto as appendix A. The court of appeals decision is appended hereto as appendix B.

JURISDICTION

The Court of appeals entered judgment on June 20, 1986. This Court has jurisdiction to review the judgment below under 28 USCA Section 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(h) of the 1964 Civil Rights Act provides.

> "... it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system..." 42 USCA Section 2000e (2)(h).

STATEMENT OF THE CASE

I. (a) In 1974 following more than six months of negotiations between, on the one side the EEOC and the Departments of Justice and Labor, and on the other side, nine major steel companies and the United Steelworkers of America, a complaint with two consent decrees was filed on the same day in the Northern District of Alabama. The case involved all of the major steel producers in America.

The complaint charged the companies with violations of Title VII and Executive Order 11246 in hiring and initial assignment and the companies and the union with negotiating collective bargaining agreement which served to perpetuate past discrimination by means of such devices as job or department seniority. Judge Pointer approved both consent decrees later the same day. United States v. Alleghany - Ludlum Industries, Inc., 63 F.R.D. 5

(N.D.Ala. 1974), 8 FEP 198, 200-201 (1974). As found by both the District Court and the Court of Appeals, Consent Decree I was primarily intended to reform the parties' seniority practices by providing for "(1) plant continuous service, (2) transfer rights, (3) rate retention, (4) goals, and (5) back pay..." (R. Vol 1, Ex. 2 at p. 7).

The Decree made reference to the "eight plants of the Fairfield Works of United States Steel Corporation" just as it carefully defined the measure of continuous service as "plant continuous service" meaning the date an employee was hired at a facility as opposed to the date of hire with an employer.

"Except where a Basic Labor Agreement entered into between one or more of the Companies and the Union provide for the use of Company continuous service or some greater measure of service length than

plant continuous service, (hereinafter plant service) shall be used beginning on the first date referred to in paragraph 3(b), for all purposes in which a measure of continuous service is presently being utilized..." (R. Vol I, Ex. 2 at p. 20). Thus it was that the parties consented and the Court decreed that continuous service was to be measured by reference to "plants".

(b) The Court of Appeals approved the Consent Decrees as a novel and important effort to encourage and negotiate settlement of widespread charges of employment discrimination in the nation's steel industry. As the Court noted "the substantive relief falls into three basic catagories: (1) immediate implementation of broad plant wide seniority, along with transfer and testing reforms, and adoption of ongoing mechanisms for further reforms of seniority, departmental, and line of

progression (LOP) structures, all of which are designed to correct the continuing effects of past discriminatory assignments..." (Emphasis added) United States v. Alleghany - Ludlum Industries, 517 F.2d 826, 835 (5th Cir. 1975).

The Audit and Review Committee was described by the Court of Appeals as the "hub mechanism in the decrees' system of continuing review, enforcement and compliance.... It meets regularly to oversee compliance with the decrees and to resolve disputes which came before it.... This Committee is composed of representatives of the Department of Justice, the companies and the union." Id. at 835.

(c) In 1981 the Steelworkers and U.S. Steel concluded the first of a series of collective bargaining agreements relating to a new continuous caster and pipe mill to be constructed at Fairfield Works in

Alabama. At the Company's insistance the new facility was to be treated as a new and separate plant for all purposes of the Basic Labor Agreement and Local Seniority Agreement. It was agreed at the outset that assignments to pipe mill jobs would first be offered to Local 1013 members with remaining vacancies to be offered to Fairfield Works employees. (R. Vol 111, Ex. J, App. A). The seniority system was confirmed in all the later agreements (11/16/82, 1/31/83, 2/3/84, 2/16/84) as was the agreement to treat the pipe mill as a new and separate plant for seniority purposes with date of hire or training (plant seniority) to serve as the measure of seniority.

An elaborate application and bid procedure for pipe mill employment began in late 1982 at which point, as has been seen, the pipe mill was understood by all to represent a new plant with plant service

dates to be assigned at date of hire or the date training commenced. It was on the basis of these assurances that many Local 1013 members bid on pipe mill vacancies in spite of being required to forfeit all seniority rights at other Fairfield plants. Hiring began in mid - 1983 with plant service dates as of the date of hire or when training began and the plant went into operation in January 1984.

By late 1984 the pipe mill work force was in place and pipe mill date of hire was being employed in all the ordinary applications of seniority, i.e., promotions, demotions, layoffs and recall from layoff.

The Audit and Review Committee was sufficiently impressed with U.S. Steel's presentation respecting the need for separateness of the pipe mill to file a proposed amendment to the Consent Decree in December 1984 recounting the history of

bargaining, adverting to the Company's insistance on obtaining concessions in the work rules and stating its agreement with all that had transpired since 1981:

> The Audit and Review Committee, and counsel for the United States and the Equal Employment Opportunity Commission, believe the Company's stated justification represent a legitimate business consideration for having the Fairfield Seamless Pipe Mill treated as a new plant to be listed in Consent Decrees I rather than listed in the Fairfield Decree, and that none of the terms of either decree preclude the Company and Union from seeking an amendment to Consent Decree I to such effect. It is for these reasons that the Audit and Review Committee and counsel for the Government recommend that this joint motion be granted. (R. Vol. 111, Ex. 35 at paragraph 6).

In December 1984 Judge Pointer approved amendment No. 11 instructing the Audit and Review Committee to oversee the proper implementation of the consent decrees to the pipe mill "including the establishment of appropriate plant continuous service dates for bargaining

unit employees manning the facility." (Ibid. at p. 2). Thus, all that had occurred in collective bargaining received the blessings of both the Audit and Review Committee and Judge Pointer and became part of the Consent Decree.

In the meanwhile the local union and management at the Pipe Mill negotiated an agreement of July 16, 1984, which undertook to allow Local 1013 employees to use their Local 1013 seniority dates.[1] This local agreement provoked a challenge by the "Johnson intervenors" and also provoked the Audit and Review Committe to reconsider and to contradict its earlier approval of the

1. While this agreement to allow a longer measure of service to some but not all pipe mill workers was criticized as favortism, in reality it disadvantaged none of the non-1013 employees whose relative position on the bottom one-third of the seniority roster remained unchanged. The reshuffling that took place was among the 1013 employees who occupied the upper two-thirds to begin with; thus the 1013 class gained noting relative to the 1013 class by reason of the local seniority contract of July, 1984.

agreements in which the pipe mill was to be treated as a new facility. The Committee, some two years following the first hiring at the pipe mill, suddenly decided that Fairfield Works seniority, rather than pipe mill date of hire, would be the measurement of continuous service. In other words, the Audit and Review Committee, rather than returning to the date of hire seniority arrangement interposed a new seniority concept of works seniority theretofore unknown in the American steel industry but one, interestingly enough, that the Justice Department had sought in the original complaint filed in 1974.

The Wallace intervenors alleged in their complaint that the use of works sneiority violated Consent Decree I, the Basic Labor Agreement and the Local seniority agreement, and their rights as employees to have their working conditions formed by means of collective bargaining.

The district court heard argument from the intervenors, allowed a limited intervention but dismissed the complaints pursuant to Rule 12(b)(6), F.R.C.P., for failing to state a claim upon which relief can be granted. The district court could find nothing wrong with use of Fairfield Works seniority, the use of Works seniority was "not in conflict with the purposes of Consent Decree I. (Ibid. Memorandum of Opinion at p. 2.).

REASONS FOR GRANTING THE WRIT

I. The Results of Collective Bargaining Are Not Subject To Governmental or Judicial Veto.

In order to accomplish certain national objectives Congress, in 1935, by means of "encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" undertook to eliminate obstacles to the free flow of commerce by enacting the National Labor Relations Act. 29 USCA Section 151.

Congress intended that collective bargaining would serve a number of national goals including the stability resulting from agreements containing no-strike

clauses,[2] to correct an imbalance in the relative strength of the contending parties[3] and by means of "constructive, open discussions" it was hoped that the passions and prejudices of the past would be overcome.[4] However, the object of the Act "was not to allow government regulation of the terms and conditions of employment but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions." H.K. Porter Co. v. N.L.R.B., 397 U.S. 99 90 S.Ct. 821 (1970). The Supreme Court, in one of its earliest statements about the Wagner Act, confirmed that:

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2. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

3. S. Rep. No. 574, 74th Cong., 1st Sess. 12 (1935).

4. H.K. Porter v. NLRB, 397 U.S. 99 (1970).

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever... The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel. "NLRB v. Jones & Laughlin Steel Co., 301 U.S. at 45.

Following what was preceived to be some overreaching by the Board, Congress amended the Act in 1947 to state that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." 29 USCA Section 158(d). In discussing the effects of that amendment, the Supreme Court has said it is "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." NLRB v. American Insurance Co., 343 U.S. 395, 404 72 S.Ct. 824 (1952). Later the Court

affirmed that view stating that "it remains clear that section 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements." NLRB v. Insurance Agents, 361 U.S. 477 80 S.Ct. 419 (1960). Emphasizing that the Act is grounded on the premise of freedom of contract the Supreme Court in 1970 once again had occasion to remind the government of the limits of its authority to order an employer or a union to agree to a substantive term of a labor contract even for the purpose of remedying a violation of

the Act.[5] H.K. Porter v. NLRB, 90 S.Ct. at 826.

Of more recent coinage is the struggle in a closely related context over seniority systems which are said to perpetuate the effects of past discrimination. Although the Civil Rights Act of 1964 contained a savings clause protecting bona fide seniority systems, for over a decade after passage of the law the view that Section 703(h) did not immunize seniority systems that perpetuate past discrimination gained much support. Quarles v. Philip Morris Inc., 229 F.Supp. 505 (E.D. Va. 1968); United Paperworkers v. United States, 416

5. While a labor arbitrator has considerable latitude to interpret collective bargaining agreements and to fashion appropriate remedies he "does no sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award it legitimate only so long as it draws its essence from the collective bargaining agreement." United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 135 8 (1960).

F.2d 980 (5th Cir. 1969). Eventually, however, the Supreme Court was forced to conclude that "both the literal terms of Section 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." Teamsters v. United States 97 S.Ct. at 1863. The Court concluded that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII because it may perpetuate pre-Act discrimination. "Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminates." Id. at 1863.

The inviolability of the results of labor negotiations received a strong affirmation in W.R. Grace and Co. v. United Rubber Workers, _____ U.S. _____, 103 S.Ct

2177 (1983), in which the Supreme Court emphatically rejected the notion that the government's concept of equality was entitled to preference over the terms of a valid nondiscriminatory seniority system. "The Company voluntarily assumed its obligations under the collective bargaining agreement and the arbitrators' interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden." 103 S.Ct. at 2186.

In the case of Firefighters v. Stotts, _____ U.S. _____, 104 S.Ct. 2576 (1984), the Supreme Court again upheld the citadel of seniority against government interference. In the absence of new victims a consent decree was incapable of being modified to override a collectively bargained seniority system requiring layoff of the youngest employee although such a

system may well impact more severely on miniority workers. Once again, adverting to the legislative history relied on in Teamsters, the Court went on to reject the idea that the decree's modification was proper pursuant to the district court's equity jurisdiction. The court lacks authority "to impose a modification of a decree that runs counter to statutory policy." 104 S.Ct. at 2590, n.17.

The pipe mill seniority agreements for the years 1981-84 were the product of collective bargaining between U.S. Steel and the Steelworkers. None of those agreements were negotiated in order to discriminate nor is there any claim to that effect. U.S. Steel and the Steelworkers negotiated a seniority system for the pipe mill which the Audit and Review Commitee cannot overrule. Even the Union's agreement as a member of the Audit and Review Committee cannot serve to change the

pipe mill plant seniority system because what the Audit and Review Committee did with or without the Union's consent is not collective bargaining, which is, by definition, negotiations between an employer and a bargaining representative sans government supervision.

Our complaint is with the Audit and Review Committee. We are attempting, after all, to enforce a series of contracts negotiated by the Union for the Petitioner's benefit. To the extent that the Union is a member of the Committee it performs a remedial and not a bargaining function; it is a vehicle to remedy the past but not to determine the future; it serves as a judicial servant but not as a servant of collective bargaining.

The Union and the Company are free to do things in collective bargaining that the Audit and Review Committee, with its limited powers, cannot do. W.R. Grace and

Co. v. United Rubber Workers, supra; Firefighters v. Stotts, supra.

II. THE LOWER COURT DECISIONS CONFLICT WITH TEAMSTERS, STOTTS AND W.R. GRACE.

Consent Decree I had as its purpose and scope to resolve all charges of discrimination and issues arising thereunder and to increase the promotional opportunities of minorities, female and longer service employees. (R. Vol I, Ex. 2 at p. 7). The Decree sought to achieve its ends by, inter alia, the use of "plant continuous service" at each of over one hundred separately named "plants" in the United States belonging to the nine signatory steel companies. (Id. at 8-12).

Consent Decree I did not pretend to supplant collective bargaining:

> EFFECT OF COLLECTIVE BARGAINING -- The terms of this Decree shall be fully binding on the Companies and Union as defined in paragraph 2, and the arrangements provided herein are hereby made a part of the defendants' Basic Labor Agreement as though ex-

> pressly incorporated therein, the provisions of any such Basic Labor Agreement, local seniority agreement, practice or arrangement to the contrary notwithstanding. Provided, however, nothing in this Decree shall operate to prevent the Companies and the Union from Pursuing normal collective bargaining related to areas covered by this Decree so long as nothing done therein shall be inconsistent with this Decree.

It is also important that the consent decree embodied the doctrines of res judicata and collateral estoppel as to "all plaintiffs with respect to all issues of law and fact and matters of relief within the scope of the complaint of this Decree." (Id. at p. 4).

By its terms Consent Decree I was not intended to and indeed could not remove from the parties the right to engage in collective bargaining such as later occurred when, beginning in 1981, U.S. Steel and the Steelworkers signed the first of a series of contracts which led to the construction and eventual manning of the

Fairfield pipe mill. In that agreement and in all subsequent agreements plant service (i.e. the first day worked at the plant) would be the governing rule for measuring length of continuous service. Indeed, this was the only measurement of continuous service that the Audit and Review Committee could approve for the pipe mill in view of the definitions contained in the Consent Decree. Only the process of collective bargaining could arrive at a longer measurement of service than that beginning the date of hire at a particular plant.

The Petitioners charge that the Audit and Review Committee has usurped collective bargaining. The element of government supervision taints the Committee's action respecting the Pipe Mill. We have raised a major issue of the extent to which a government sponsored committee can veto the results of free collective bargaining. The Committee has gone far beyond its limited

role of insuring compliance to making decisions which can only be made by the parties. The question is not whether works seniority is right or wrong but whether a consent decree committee which includes government representatives can make the decision.

CONCLUSION

The Steel Industry has a long history of permitting seniority to be set by agreement at the loca level. It was a local seniority agreement which the Audit and Review Committee overruled substituting its crude concept of what ought to be for that which the parties had selected in free unsupervised collective bargaining.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been furnished to:

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by way of regular U.S. Mail on this the 17 day of September, 1986.

George C. Longshore
Attorney at Law

APPENDIX A
Typed for ease
of reading.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA, et al.,	)
Plaintiffs,	)
and	)
MICHEAL WALLACE, ERIC SMITH, BETTY STAFFORD, A.L. FRAZIER, JIM LATNER, W.P. KALLAHER, JR., who seek to intervene in their behalf and in behalf of a class of persons similarly situated,	)
Applicants for Intervention,	)
and	)
JOHNNY JOHNSON, et al.,	)
Applicants for Intervention,	)
vs.	)
ALLEGHANY-LUDLUM INDUSTRIES, et al.,	)
Defendants.	)

MEMORANDUM OF OPINION

On June 18, 1985, the court heard arguments for and opposing allowing the intervention in this case. All interested

parties were represented by counsel, including the three classes of potential intervenors. The sum of all the class members requesting intervention would equal every United Steel Workers of America union member either employed at the Fairfield Works Seamless Pipe Mill or potentially employed there. Each class of intervenors seek review by this court of a decision made by the Audit and Review Committee, Docket Number 130-17, dated March 28, 1985, alleging this decision violates various rights which their class members hold. The Committee received the power to make such a decision effecting the Seamless Pipe Mill plant union workers pursuant to ths court's approval of Amendment Eleven of the original consent decree, entered December 4, 1984. The affect of Amendment Eleven was to bring the Fairfield Seamless Pipe Mill within the purviews of the original plan set forth in this decree.

Subsequent to the December 4th order, the committee negotiated and concluded in its decision that the Fairfield Works continuous service date was to be sued as the measure of seniority for the workers stationed within the Seamless Pipe Mill plant. Prior to this decision, the primary date to establish seniority rights had been the date the employee first began working in the Seamless Pipe Mill Plant itself. The potentially longer Fairfield Works continuous service date was used only if two or more employees with the same in-plant service date competed for the same position.

This court retained jurisdiction to review certain events arising under the original decree. Paragraph Twenty of the Consent Decree I states:

> The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this decree.

In light of this authority, the court concludes that the intervenors' Motions to Intervene are due to be granted to the extent the intervenors' complaints attack the Audit and Reveiw Committee's decision of March 28, 1984, as being contrary to the provisions of Consent Decree I. The granting of these motions is on a limited basis, and is not for the broader purpose of having the court review the competing positions among the United Steelworkers Union, its membership or subclasses thereof. Intervention in a manner other than on this limited basis places the court in the position of not enforcing the consent decree but soley reviewing the decisions made by the union in representing its membership.

Reviewing the Audit and Reveiw Committee's decision in light of the Consent Decree I, the court finds no merit in the intervenors' complaint. The March

28, 1985 Committee decision is not in conflict with the purposes of Consent Decree I. The establishment of the Fairfield Works continuous work date as a basis for seniority is entirely consistent with this decree and the court's approval of Amendment Eleven. Finding no merit to the intervenors' complaint as to the permissibility of the Audit and Review Committee's decision, the intervenors' complaint is due to be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A separate order to this effect will be entered.

This the 28th day of June, 1985.

U. S. District Judge

APPENDIX B
Typed for ease
of reading.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 85-7530 & 85-7661

D.C. Docket No. 74-0339

UNITED STATES OF AMERICA, etc., et al.,

Plaintiffs - Appellees,

MICHEAL WALLACE, ERIC SMITH, BETTY STAFFORD, A.L. FRAZIER, JIM LATNER, W.P. KALLAHER, JR., who seek to intervene in their behalf and in behalf of a class of persons similarly situated,

Applicants for Intervention - Appellants,

versus

ALLEGHENY-LUDLUM INDUSTRIES, INC., et al.,

Defendants - Appellees.

Appeals from the U S District Court for the

Northern District of Alabama

(June 20, 1986)

Before HILL, Circuit Judge, HENDERSON*, Senior Circuit Judge, and LYNNE**, Senior District Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.

"Costs taxed against applicants for intervention-appellants."

*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Seybourn H. Lynn, Senior U.S. District Judge for the Northern District of Alabama, setting by designation.

Judgment Entered: June 20, 1986
For the Court: Miguel J. Cortez, Clerk,

By: _____
Deputy Clerk

ISSUED AS MANDATE:

Appendix A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division

UNITED STATES OF AMERICA, et al.,

Plaintiff,

and

MICHAEL WALLACE, ERIC SMITH, BETTY STAFFORD, A. L. FRAZIER, JIM LATNER, W. P. KALLAHER, JR., who seek to intervene in their behalf and in behalf of a class of persons similarly situated,

Applicants for Intervention,

and

JOHNNY JOHNSON, et al.,

Applicants for Intervention,

-vs.-

ALLEGHANY-LUDLUM INDUSTRIES, et al.,

Defendants.

FILED

JUN 28 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
JAMES E. VANDEGRIFT, CLERK

dlm

ENTERED

JUN 28 1985

No. CV 74-P-0339-S

Memorandum of Opinion

On June 18, 1985, the court heard arguments for and opposing allowing the intervention in this case. All interested parties were represented by counsel, including the three classes of potential intervenors. The sum of all the class members requesting intervention would equal every United Steel Workers of America union member either employed at the Fairfield Works Seamless Pipe Mill or potentially employed there. Each class of intervenors seek review by this court of a decision made by the Audit and Review Committee, Docket Number 130-17, dated March 28, 1985, alleging this decision violates various rights which their class members hold. The Committee received the

81

power to make such a decision effecting the Seamless Pipe Mill plant union workers pursuant to this court's approval of Amendment Eleven of the original consent decree, entered December 4, 1984. The effect of Amendment Eleven was to bring the Fairfield Seamless Pipe Mill within the purviews of the original plan set forth in this decree.

Subsequent to the December 4th order, the committee negotiated and concluded in its decision that the Fairfield Works continuous service date was to be used as the measure of seniority for the workers stationed within the Seamless Pipe Mill plant. Prior to this decision, the primary date to establish seniority rights had been the date the employee first began working in the Seamless Pipe Mill Plant itself. The potentially longer Fairfield Works continuous service date was used only if two or more employees with the same in-plant service date competed for the same position.

This court retained jurisdiction to review certain events arising under the original decree. Paragraph Twenty of the Consent Decree I states:

> The court hereby retains jurisdiction of this cause for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this decree.

In light of this authority, the court concludes that the intervenors' Motions to Intervene are due to be granted to the extent the intervenors' complaints attack the Audit and Review Committee's decision of March 28, 1984, as being contrary to the provisions of Consent Decree I. The granting of these motions is on a limited basis, and is not for the broader purpose of having the court review the competing positions among the United Steelworkers Union, its membership or subclasses thereof. Intervention in a manner other than on this limited basis places the court in the position of not enforcing the consent decree but solely reviewing the decisions made by the union in representing its membership.

Reviewing the Audit and Review Committee's decision in light of the Consent Decree I, the court finds no merit in the intervenors' complaint. The March 28, 1985 Committee decision is not in conflict with the purposes of Consent Decree I. The

establishment of the Fairfield Works continuous work date as a basis for seniority is entirely consistent with this decree and the court's approval of Amendment Eleven. Finding no merit to the intervenors' complaints as to the permissibility of the Audit and Review Committee's decision, the intervenors' complaint is due to be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A separte order to this effect will be entered.

This the 25th day of June, 1985.

United States District Judge

A TRUE COPY
JAMES E. VANDEGRIFT, CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
BY: Susan Manning
DEPUTY CLERK

62

Appendix 15

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Nos. 85-7530 & 85-7661

D.C. Docket No. 74-0339

UNITED STATES OF AMERICA, etc., et al.,

Plaintiffs-Appellees,

MICHAEL WALLACE, ERIC SMITH, BETTY STAFFORD, A. L. FRAZIER, JIM LATNER, W. P. KALLAHER, JR., who seek to intervene in their behalf and in behalf of a class of persons similarly situated,

Applicants for Intervention-Appellants,

versus

ALLEGHENY-LUDLUM INDUSTRIES, INC., et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Alabama

---

(June 20, 1986)

Before HILL, Circuit Judge, HENDERSON*, Senior Circuit Judge, and LYNNE**, Senior District Judge.

PER CURIAM: AFFIRMED. See Cir. R. 25.

"Costs taxed against applicants for intervention-appellants."

*See Rule 3(b), Rules of the U. S. Court of Appeals for the Eleventh Circuit.

**Honorable Seybourn H. Lynne, Senior U. S. District Judge for the Northern District of Alabama, sitting by designation.

Judgment Entered: June 20, 1986
For the Court: Miguel J. Cortez, Clerk
By: Deputy Clerk

DATE: JUN 23 1986

Supreme Court, U.S.
FILED
OCT 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-541

IN THE

Supreme Court Of The United States

October Term, 1986

MICHAEL WALLACE, et al.,
Petitioners

vs.

ALLEGHENY-LUDLUM INDUSTRIES, INC., et al.,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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USX Corporation

OF COUNSEL:

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PARTIES IN THE COURT BELOW

The following persons were parties in the court below:

1. The United States of America ..... Plaintiff-Appellee
2. Michael Wallace ..... Intervenor-Appellant
3. Eric C. Smith ..... Intervenor-Appellant
4. Alfonzo Frazier, Jr. ..... Intervenor-Appellant
5. Betty Stafford ..... Intervenor-Appellant
6. W. P. Kallaher, Jr. ..... Intervenor-Appellant
7. Jim Latner ..... Intervenor-Appellant
8. United States Steel Corporation ..... Defendant-Appellee
9. United Steelworkers of America, AFL-CIO-CLC ..... Defendant-Appellee

INFORMATION REQUIRED BY RULE 28.1

Respondent, USX Corporation, formerly known as United States Steel Corporation, is a corporation incorporated under the laws of the State of Delaware, and its principal place of business is in Pittsburgh, Pennsylvania. USX Corporation is not a subsidiary of any other company, and all of its subsidiaries are listed below:

1. Bessemer and Lake Erie Railroad Company
2. Birmingham Southern Railroad Company
3. Carnegie Natural Gas Company
4. Duluth, Missabe and Iron Range Railway Company
5. Elgin, Joliet and Eastern Railway Company
6. Navios Corporation
7. Navios Ship Management Services, Inc.
8. Ohio Barge Line, Inc.
9. Percy Wilson Mortgage and Finance Corporation
10. The Pittsburgh & Conneaut Dock Company
11. RMI Company
12. Quebec Cartier Mining Company
13. Union Railroad Company
14. United States Steel International, Inc.
15. USS Engineers and Consultants, Inc.
16. USS Great Lakes Fleet, Inc.
17. USS Great Lakes Fleet Services
18. USS Max Tech Co., Inc.
19. USS Oilwell Supply Company, Inc.
20. USS Lake Transport, Inc.
21. USS Western Hemisphere, Inc.
22. U.S. Steel Credit Corporation
23. U.S. Steel Mining Co., Inc.
24. Warrior & Gulf Navigation Company
25. Emro Land Company
26. Marathon Finance Company
27. Deutsche Marathon Petroleum GmbH
28. Hancock Shipping Company, Limited

29. Marathon International Oil Company
30. Marathon International Petroleum (G.B.) Limited
31. Marathon International Petroleum Supply Company
32. Marathon Marine, Inc.
33. Marathon Oil Company
34. Marathon Oil North Sea (G.B.) Limited
35. Marathon Oil U.K., Ltd.
36. Marathon Petroleum Angola, Ltd.
37. Marathon Petroleum Australia, Ltd.
38. Marathon Petroleum Company, Inc.
39. Marathon Petroleum Company (Norway)
40. Marathon Petroleum Egypt, Ltd.
41. Marathon Petroleum Indonesia, Ltd.
42. Marathon Petroleum Ireland, Ltd.
43. Marathon Petroleum Kenya, Ltd.
44. Marathon Petroleum Libya, Ltd.
45. Marathon Petroleum Norte Brazil, Ltd.
46. Marathon Petroleum Syria, Ltd.
47. Marathon Petroleum Tunisia, Ltd.
48. Marathon Pipe Line Company
49. Pan Ocean Energy Company
50. Pan Ocean Oil Corporation (Abu Dhabi)
51. USS Portfolio, Inc.

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No. 86-541

IN THE

Supreme Court Of The United States

October Term, 1986

MICHAEL WALLACE, et al.,
Petitioners

vs.

ALLEGHENY-LUDLUM INDUSTRIES, INC., et al.,
Respondents

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case is not entirely complete. Accordingly, respondent, USX Corporation, known as United States Steel Corporation ("U.S. Steel") during the proceedings below, is forced to provide its own statement of the case in order for the Court to fully understand the issue presently under consideration.

On April 12, 1974, the United States, on behalf of the Secretary of Labor and the Equal Employment Opportunity Commission ("EEOC"), filed a complaint in the United States District Court for the Northern District of Alabama. Nine ma-

jor steel companies,[1] including U.S. Steel, and the United Steelworkers of America, AFL-CIO ("the Union"), were named as defendants. The suit involved some 240-250 plants at which more than 300,000 persons were employed, over one-fifth of whom were black, Latin American, or female. *United States v. Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. 1, 3 (N.D. Ala. 1974). Alleging massive patterns and practices of hiring and job assignment on the basis of race, sex, and national origin, the complaint sought to enforce the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and contractual obligations under Executive Order 11246, as amended.

The filing of the complaint culminated more than six months of intensive, hard-fought negotiations between the parties. Simultaneously with the filing of the complaint, the parties announced to the court that a nationwide settlement had been reached. *United States v. Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. at 3. Accordingly, two consent decrees were presented to the court for approval. Describing the decrees as "a thoughtful and earnest attempt to respond to – and to reconcile competition between – charges of employment discrimination made on behalf of black, female, and Spanish surnamed workers and applicants," District Judge Sam C. Pointer, Jr., signed and entered the decrees later that same day. *Id.* The purpose of the consent decrees was and is to increase the promotional and transfer opportunities of "minorities, females, and longer service employees," and to ensure equal treatment of all employees within a given plant.

Consent Decree I, the subject of the petition, takes the form of a permanent injunction and deals with matters which, in general, are the subject of collective bargaining between the companies and the Union. The decree provided for a restruc-

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[1]Allegheny-Ludlum Industries, Inc.; Armco Steel Corporation; Bethlehem Steel Corporation; Jones & Laughlin Steel Corporation; National Steel Corporation; Republic Steel Corporation; United States Steel Corporation; Wheeling-Pittsburgh Steel Corporation; Youngstown Sheet & Tube Company.

turing of seniority rules and regulations, primarily using plant continuous service as a base. *The decree expressly provides, however, that the parties are free to use "company continuous service or some greater measure of service length than plant continuous service."*[2] Consent Decree I also specifies procedures for promotions, transfers, layoffs, and recalls, and provided for a back-pay fund of $30,940,000.00, along with guidelines for calculating and disbursing awards to individual employees affected by alleged past discrimination. 63 F.R.D. at 3.[3]

Recognizing that "general standards may require tailoring to meet local problems and that experience may indicate the inadequacy of some of the remedial steps," the parties, in Consent Decree I, established a structure of Implementation Committees, composed of company, union, and minority members, at each affected facility, as well as an Audit and Review Committee, which is national in scope. 63 F.R.D. at 3. The Audit and Review Committee is composed of five members from the companies, five members from the Union, and one government representative. The primary functions of the committee, as stated in Consent Decree I, are: (1) to review the implementation at each plant or facility of the objectives and procedures established by the decrees to ensure compliance therewith; and (2) to propose "corrective steps" at any plant or facility to

---

[2]In the early days of Title VII, the steel companies, as well as other manufacturers throughout the nation, used various measures of seniority, including occupational seniority, line of progression seniority, and departmental seniority, which often resulted, by their operation, in fewer job opportunities for blacks. *See, e.g., United States v. United States Steel Corp.*, 371 F.Supp. 1045, 1051 (N.D. Ala. 1973), *order denying back pay vacated and remanded with directions*, 520 F.2d 1043 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 216 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1373-74 (5th Cir. 1974). To remedy this situation, "plant age," or some broader measure of seniority, was instituted for promotion, transfer, layoff, and recall purposes. *Id.*

[3]Consent Decree II deals with employment matters which are, essentially, company-controlled and not normally subject to collective bargaining agreements. For purposes of this case, only Consent Decree I is relevant.

overcome any shortcomings in the decrees or their implementation. In short, the decrees provide that the ongoing application and implementation of their numerous, specific provisions "shall be subject to the review of the Audit and Review Committee."

Consent Decree I further provides that its terms, including the provisions relating to the Audit and Review Committee, are incorporated in and constitute a part of the defendants' Basic Labor Agreement:

> *Effect on Collective Bargaining.* The terms of this Decree shall be fully binding on the Companies and Union as defined in paragraph 2, and the *arrangements* provided herein are hereby made a part of the defendants' Basic Labor Agreement as though expressly incorporated therein, the provisions of any such Basic Labor Agreement, local seniority agreement, practice or arrangement to the contrary notwithstanding. Provided, however, nothing in this decree shall operate to prevent the Companies and the Union from pursuing normal collective bargaining related to areas covered by this Decree so long as nothing done therein shall be inconsistent with this Decree. (emphasis added).

Finally, under Consent Decree I, jurisdiction was retained by the district court "for the purpose of issuing any additional orders or decrees needed to effectuate, clarify or enforce the full purpose and intent of this Decree." Jurisdiction was retained because, in the words of Judge Pointer, "[t]he decrees may require clarification in some particulars and, indeed, as administration of the decrees continue, there will doubtless be problems which were not considered or anticipated by the parties or which run counter to the expectations during negotiations." 63 F.R.D. at 6.

Shortly after entry of the decrees, various individuals and organizations petitioned to intervene for the purpose of vacating the consent decrees. The intervenors' claims were rejected by the district court, and they then appealed. 63 F.R.D. at 8. On appeal, the Fifth Circuit affirmed the judgment of the district court, holding that "the settlement has not been shown

to be in any respect unlawful or improper, and hence its terms, conditions, and benefits must go forward immediately in their entirety." *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 834 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). With respect to the Audit and Review Committee, the Fifth Circuit stated as follows:

> The decrees must be made to function in varying and peculiar situations in accordance with the parties' ambitious objectives. Furthermore, the parties contemplated that unforseen interpretive issues will inevitably arise and require resolution. With these considerations in mind, the decrees provide for the establishment of implementation and enforcement procedures. . . . *The Audit and Review Committee,* established under paragraph 13 of Consent Decree I, *is the hub mechanism* in the decrees' system of *continuing* review, enforcement, and compliance. . . . It meets regularly to oversee compliance with the decrees and to resolve disputes which come before it. . . . The committee may propose remedial steps at any plant in order to overcome deficiencies in either the decree or its results.

517 F.2d at 835-36 (emphasis added).

The Fifth Circuit concluded its opinion by stating that "the parties have expressed a preference for a scheme which contemplates ongoing voluntary compliance in an unusual day-to-day atmosphere of self-government," 517 F.2d at 874, and that "these consent decrees are consistent with the public interest, represent a sound and reasonable exercise of the discretion possessed by the executive agencies, and implement the policies of Title VII and related laws to an exceptionally thorough degree." 517 F.2d at 881.

On December 4, 1984, the companies and the Union filed a joint motion for the entry of Amendment No. 11 to Consent Decree I. The purpose of the motion was to add "the newly constructed Fairfield Seamless Pipe Mill of the United States Steel Corporation ("the Pipe Mill") to the plants listed in paragraph 3(c) of that decree, thereby subjecting that plant to the requirements of that decree and Consent Decree II, and to the jurisdiction of the Audit and Review Committee." The

Audit and Review Committee unanimously recommended to the district court that the joint motion be granted. However, *and contrary to the assertion throughout the petition,* by endorsing Amendment No. 11 to Consent Decree I so as to subject the Pipe Mill to the requirements of that decree, neither the Audit and Review Committee nor counsel for the government approved the initial manning agreements regarding the Pipe Mill entered into between U. S. Steel and the Union, including the July 16, 1984 memorandum of understanding. Furthermore, and again, contrary to petitioners' assertion, the July 16, 1984 memorandum of understanding was the first agreement establishing a seniority arrangement for Pipe Mill employees, and specifically provided that it would be implemented *only* upon review and approval by the Audit and Review Committee.

The Audit and Review Committee, upon obtaining jurisdiction over the Pipe Mill upon the entry of Amendment No. 11, intended to "review and pass on whether the remaining portions of those agreements, as well as the other further agreements which may have been negotiated concerning that facility, are consistent with the purpose and intent of Consent Decree I and its specific provisions." Accordingly, based on the consent of the parties and the recommendation of all members of the Audit and Review Committee, the amendment was granted and the Pipe Mill was added "as one of the listed plants of the defendant United States Steel Corporation." Upon entering the amendment, the district court ordered the Audit and Review Committee to "oversee and assure the proper implementation of the consent decrees at the Fairfield Seamless Pipe Mill, including the establishment of appropriate plant continuous service dates for bargaining unit employees manning that facility."

On March 28, 1985, the Audit and Review Committee rendered its decision on the Pipe Mill manning agreements, including the July 16, 1984 memorandum of understanding. To ensure compliance with the purpose of the consent decrees — to increase the promotional and transfer opportunities of "mi-

norities, females and longer service employees," and to ensure equal treatment of all employees within a given plant – the Audit and Review Committee ruled that, "effective April 1, 1985, the Pipe Mill plant continuous service date of every Pipe Mill plant employee holding seniority rights in that plant as of March 31, 1985, shall be that employee's Fairfield Works continuous service date." The Audit and Review Committee reasoned that Fairfield Works seniority, which had been negotiated by U. S. Steel and the Union for Local 1013 employees only, should be applied to all Pipe Mill employees, because as part of Consent Decree I, the parties agreed that all persons in a particular plant should be treated the same and required to calculate their continuous service for seniority purposes in a common manner. Faced with a difference in treatment between Local 1013 employees and non-Local 1013 employees at the Pipe Mill, and the Union's concern over this difference in treatment, the Audit and Review Committee determined that all Pipe Mill employees, not just Local 1013 employees, should enjoy the longer term of seniority negotiated by U. S. Steel and the Union. The committee's decision was unanimous, with U. S. Steel's representative and the Union's representatives serving on the committee voting in favor of works seniority.

On April 26, 1985, Michael Wallace, et al., petitioners herein, filed a motion to intervene with the district court, alleging that "the Audit and Review Committee's departure from plant service is a violation of the Consent Decrees, the Basic Labor Agreement and the Local Seniority Agreement." The intervenors sought injunctive relief "enjoining the Audit and Review Committee from use of works seniority" and a declaration that "plant continuous service be declared to be the *only* appropriate measure of seniority at the Pipe Mill."

A hearing was held on June 18, 1985, during which the purported intervenors were given ample opportunity to set forth their position. (App. 1-2). At the hearing, Judge Pointer stated that in 1974 the Audit and Review Committee became a part of the collective bargaining process, as did both consent decrees, and that "the Consent Decree provides that at a *mini-*

mum there should be plant continuous service and that this does not in any way preclude a longer or broader measure of seniority." Thereafter, Judge Pointer entered an order and memorandum opinion granting the motion to intervene, but concluded that the intervenors' complaint failed to state a claim upon which relief could be granted. In dismissing the complaint, the court stated that "[t]he March 28, 1985 Committee decision is not in conflict with the purposes of Consent Decree I. The establishment of the Fairfield Works continuous work date as a basis for seniority is entirely consistent with this decree and the court's approval of Amendment Eleven." (App. 4-5). Judge Pointer's decision was summarily affirmed by the Eleventh Circuit on June 20, 1986. (App. 6).

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any "special and important reasons" for the issuance of a writ of certiorari. Sup. Ct. Rule 17. The decision by the court below is not in conflict with any decision of another federal court of appeals or any decision of this Court. The decision below simply does not present any issue of substantial importance warranting consideration by the Court.

I. The Audit And Review Committee's Decision, Which Is Entirely Consistent With Consent Decree I, Did Not Usurp The Collective Bargaining Process.

Petitioners argue that the Court should issue a writ of certiorari because the Audit and Review Committee's decision usurped the collective bargaining process. Petitioners' argument is totally without merit.

Section 203 (d) of the Labor Management Relations Act of 1947, 29 U.S.C. § 173 (d), provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of disputes arising over the application or interpretation of an existing collective bargaining agreement." This Court has held that this policy "can

be effectuated only *if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 566 (1960) (emphasis added).

A consent decree, which implements the public policy in favor of settlement, is a compromise between the parties to the agreement. *Local No. 93 v. City of Cleveland*, ____ U.S. ____, 106 S.Ct. 3063, 3072-75 (1986). In this case, the compromise entered into between the parties — the government, the companies, and the Union — is reflected in Consent Decree I. By agreement, the consent decrees in general, and the Audit and Review Committee in particular, which is composed of representatives from the government, the companies, and the Union, and which has the function of ensuring that seniority arrangements are in compliance with Consent Decree I, constitute a part of the defendants' Basic Labor Agreement. Thus, U. S. Steel and the Union, in both Consent Decree I and the Basic Labor Agreement, agreed to give the committee the authority to review the seniority arrangement in issue.

Furthermore, U. S. Steel and the Union devised the term of seniority that the committee extended to all Pipe Mill employees. U. S. Steel and the Union had negotiated a term of seniority longer than plant service, which they had a right to do under both Consent Decree I and the Basic Labor Agreement, but applied it only to one group of employees, Local 1013 employees. The Audit and Review Committee, which simply followed the decree's requirement that all persons in a particular plant should calculate their continuous service for seniority purposes in a common manner, rendered its decision only after: (1) the normal collective bargaining process had been exhausted at the local level; and (2) a dispute under the consent decree was left unresolved. Hence, contrary to the petitioners' assertion, the Audit and Review Committee's decision was not imposed by an uninvited governmental official, but rather by an entity given the power to resolve such disputes by the parties to the collective bargaining agreement. This Court

has approved similar arrangements in collective bargaining agreements, holding that such arrangements are consistent with the public policy in favor of peaceful settlement of labor disputes through the process of collective bargaining. *See, e.g., Humphrey v. Moore,* 375 U.S. 335 (1964) (joint conference committee established in the collective bargaining agreement to resolve disputes, including seniority disputes); *General Drivers, Local No. 89 v. Riss & Co., Inc.,* 372 U.S. 517 (1963) (joint conference committee established in the collective bargaining agreement to resolve disputes between the parties). In light of the foregoing, the "usurpation" issue raised by petitioners does not present any special and important reason for the issuance of a writ of certiorari.[4]

II. The Decision By The Court Below Is Not In Conflict With Any Decision Of This Court.

Petitioners also argue that the Court should issue a writ of certiorari because the decision by the court below is in conflict with this Court's decisions in *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984); *W. R. Grace & Co. v. Local Union No. 759,* 461 U.S. 757 (1983); and *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). Like their other arguments, this final argument by petitioners is also without merit; there is simply no conflict in this case.

In *Stotts,* this Court overturned an order enjoining the City of Memphis from laying off firefighters in accordance with a seniority system established in a collective bargaining agreement. The district court's order was intended to prevent the layoffs from having a negative effect on minority gains made under a previous consent decree setting hiring and promotion

[4]Because Consent Decree I, as well as the defendants' Basic Labor Agreement, allows the parties, in structuring seniority systems, to use "company continuous service or some greater measure of service length than plant continuous service," it simply cannot be said that the use of Fairfield Works seniority as a basis for seniority at the Pipe Mill is inconsistent with Consent Decree I. As mentioned above, the decree itself expressly provides that a greater measure of seniority than plant service can be used in structuring seniority systems.

goals for minorities. The Court simply held that the order was neither authorized by the original consent decree nor a legitimate modification of that decree which could be imposed upon the City *without its consent.* While there are obviously numerous distinctions between the facts in *Stotts* and the facts of this case, the most significant factor distinguishing this case from *Stotts* is that here the consent decree and seniority arrangements were voluntarily entered into between the parties. In *Stotts,* on the other hand, the City *objected* to the district court's modification of the seniority system. *Stotts,* therefore, dealt with the power of a court to modify a consent decree over the objection of one of the parties. In contrast, in this case there was no such objection by any party, and the Audit and Review Committee's decision was fully authorized by both the consent decree and the collective bargaining agreement.

Moreover, *Stotts* must be read in light of the Court's decision in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979). In *Weber,* the Court held that an employer and union do not violate Title VII by voluntarily adopting a reasonable race-conscious plan to increase the employment opportunities of minorities, even when the plan has the effect of overriding the seniority of non-minorities. 443 U.S. at 208-09. Given this holding, *Weber* precludes any notion that Title VII absolutely forbids voluntary action by an employer and union to the detriment of the seniority of non-minority workers. *See also Local No. 93 v. City of Cleveland,* ..... U.S. ....., 106 S.Ct. 3063, 3077 (1986) ("a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial"). There is nothing in either *W. R. Grace* or *Teamsters* to the contrary. *W. R. Grace & Co. v. Local Union 759,* 461 U.S. 757, 771 (1983) (employer and union, together, can alter a collective bargaining agreement); *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977) (no consent decree involved). Hence, because there is no conflict between the decision below and any decision of this Court, the petition should be denied.

CONCLUSION

For the foregoing reasons, this case does not present any issue of substantial importance that merits consideration by the Court. The decision below is not in conflict with any decision of another federal court of appeals or any decision of this Court, and does not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

F. A. Flowers, III

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Supreme Court, U.S.
FILED
DEC 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-541

In the Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL WALLACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-541

MICHAEL WALLACE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners contend that a review committee established by a consent decree, to which the companies and union were parties, exceeded its authority in modifying a seniority agreement and placing all employees at a new steel mill under a common seniority arrangement.

1. In April 1974, the United States filed a complaint alleging that nine steel companies, including the United States Steel Corporation (U.S. Steel), violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Exec. Order No. 11246, 3 C.F.R. 339 (1965), by hiring and assigning persons to positions on the basis of race and sex and relegat-

ing minority and female employees to low-paying and undesirable jobs with the least opportunity for advancement. The complaint also alleged that the United Steelworkers of America (the union) and the steel companies had negotiated seniority systems for layoff, recall, and transfer that deprived minority and female employees of opportunities for advancement comparable to those available for white males. G.R. 1, 5-7.[1]

Two proposed consent decrees were filed with the complaint and subsequently entered by the district court. Consent Decree I (G.R. 10-63), the decree relevant to this case, was designed "to resolve all questions raised by the allegations in the complaint * * * and to achieve prompt and full utilization of minorities, females, and longer service employees by increasing the promotional and transfer opportunities of such employees * * *" (G.R. 16). To achieve this objective, Consent Decree I provided that at each steel plant governed by the decree, each employee for whom the union is the collective bargaining representative must be accorded seniority based at least on his or her "plant continuous service" (*i.e.*, service measured from the first day of employment at the plant), regardless of any prior labor agreement using a lesser measure of service for seniority purposes. Any labor agreement providing for seniority based on a measure of service longer than plant continuous service would retain that longer service length. G.R. 29; see also *id.* at 16.

The Consent Decree also established an Audit and Review Committee (the Committee), comprised of company, union, and government representatives.

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[1] "G.R." and "R." refer respectively to the record excerpts filed by the government and petitioners in the court of appeals.

The Committee's purpose was to "[r]eview the implementation at each plant or facility of the objectives and procedures established by [the] Decree to assure compliance therewith" (G.R. 49). In particular, any matter not fully resolved in negotiations between a company and the union at the local level could be brought before the Committee for resolution (*ibid.*).[2]

2. The present dispute arises from U.S. Steel's decision to build a new Seamless Pipe Mill (the Mill) in Fairfield, Alabama.[3] In July 1981 and November 1982, representatives of U.S. Steel and the union executed memoranda of understanding concerning the initial staffing at the Mill. They agreed that the Mill would be recognized as a new plant under existing labor agreements and Consent Decree I, and that Local Union No. 1013 (Local 1013) would be the local union for the plant. They further agreed that members of Local 1013 would be given priority for positions at the Mill. R. 30-31, 35.

In July 1984, after the Mill was fully staffed, U.S. Steel and the union executed another memorandum of understanding governing the seniority system for the Mill. The memorandum provided that certain named employees, almost all of whom were members of Local

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[2] In June 1974, the district court upheld Consent Decree I, and the Fifth Circuit affirmed. *United States* v. *Allegheny-Ludlum Industries, Inc.*, 63 F.R.D. 1 (N.D. Ala.), aff'd, 517 F.2d 826 (1975). The Fifth Circuit explicitly recognized the Committee's responsibility for overseeing compliance with that decree and resolving disputes, subject to review by the district court (*id.* at 835-836).

[3] Before this new plant was built, there were nine steel plants in Fairfield. Although the nine plants were known collectively as the "Fairfield Works," they were listed separately under Consent Decree I (G.R. 15, 17-21).

1013, would be accorded seniority at the Mill based on their plant service date from their old plant ("Fairfield Works" seniority); all other employees would be accorded seniority based on the date they began work at the Mill (plant seniority). R. 56-57. The memorandum also stated that "[t]he agreement will be implemented upon review and approval of the Audit and Review Committee" (R. 56). U.S. Steel and the union subsequently referred this agreement to the Committee for review and approval, along with a proposed amendment to Consent Decree I adding the Mill to the list of plants covered by that decree.

In November 1984, the Committee issued a report in which it agreed that the Mill should be added to Consent Decree I as a separate plant "so as to subject [it] to the requirements of that decree" (R. 28). The following month, the district court approved the proposed amendment adding the Mill to the list of plants covered by Consent Decree I (see R. 23, 58).

In March 1985, the Committee issued a decision disapproving the July 1984 seniority agreement (R. 59). The Committee determined that the longer seniority service date designated for only certain specified employees should be applied to all employees at the Mill. The Committee therefore ruled that effective April 1, 1985, the continuous service date of every Mill employee holding seniority rights in that plant as of March 31, 1985, would be that employee's Fairfield Works continuous service date. R. 61.

3. In April 1985, petitioners—various members of Local 1013 who had been hired by the Mill when it first opened—moved to intervene in this litigation. They alleged, inter alia, that the Committee's decision changing the Mill's seniority agreement improperly altered their relative placement on the Mill seniority list. That result, they claimed, was particularly dis-

turbing because the Mill was overstaffed and was laying off employees. In addition, they alleged that the Committee's decision to modify the seniority agreement for the Mill violated Consent Decree I and the applicable collective bargaining agreements. R. 72.

On June 28, 1985, the district court issued a memorandum opinion and order granting petitioners' motion to intervene but dismissing their complaint for failure to state a claim upon which relief could be granted (Pet. App. A1-A5). The court rejected the intervenors' claim that the Committee's decision violated Consent Decree I, stating that the amendment adding the Mill to the list of companies governed by the decree gave the Committee the power to make such a decision affecting the Mill's union workers (*id.* at A2). The court also noted (*id.* at A3) that although the Mill initially used plant seniority, Fairfield Works seniority was used under the initial seniority arrangement as well when the Mill needed to break a tie between two or more employees competing for the same position. It concluded (*id.* at A4-A5) that the Committee's decision to require the Mill to use Fairfield Works seniority for all employees did not conflict with the purposes of Consent Decree I and was therefore proper. The court of appeals affirmed without opinion (*id.* at B1-B2).

4. The order of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This case presents only a narrow issue of interpretation of a particular consent decree and raises no substantial legal questions. Review by this Court is therefore not warranted.

a. Petitioners contend (Pet. 13-25) that the Committee exceeded its authority under Consent Decree I and improperly interfered with the collective bargaining process. That claim is without merit.

To begin with, the Committee correctly determined that the July 1984 seniority agreement violated the terms of Consent Decree I. While the company and the union negotiated a seniority term longer than plant service, they did not apply that longer measure of service uniformly to all Mill employees. Rather, the agreement created a dual seniority system that placed employees working at a single plant under different methods of calculating seniority, thereby resulting in disparate treatment of similarly situated workers. Such a system conflicted with the decree's requirement that a plant's seniority system give all employees the same benefits of their prior period of service, regardless of the nature of the positions they held during that period (see G.R. 16).

Moreover, the Committee acted properly in modifying the seniority agreement to eliminate any inconsistency with the decree. Consent Decree I explicitly made the Committee responsible for reviewing such agreements to insure compliance with the decree (G.R. 49), and once the decree was amended to include the Mill as a new plant, the Committee became responsible for reviewing any seniority agreement relating to the Mill. The Committee therefore did not usurp any function of collective bargaining, but simply exercised the authority explicitly granted to it under the decree.[4]

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[4] Petitioners err in asserting (Pet. 22-25) that the decisions below conflict with this Court's decisions in *W. R. Grace & Co.* v. *United Rubber Workers*, 461 U.S. 757 (1983); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); and *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984). In *W.R. Grace*, the Court held that the company and the EEOC could not agree to nullify the collective bargaining agreement's seniority provisions without the union's involvement and consent. Here, both the union and

b. Petitioners further contend (Pet. 24) that the only valid way the Committee could have modified the July 1984 memorandum of understanding was by

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the company were active participants in the negotiations that led to the decree, and were signatories to the decree.

In *Teamsters*, the Court held that a seniority system that is negotiated and maintained without any discriminatory purpose is protected under Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h). In the present case, however, the company and the union gave up their right to litigate the validity of their former seniority system under Title VII when they decided to settle the case rather than proceed to trial. The Committee was given the authority, with the consent of both the union and the company, to review any new seniority agreement for compliance *with the decree*, not for compliance with Title VII. Thus, the existence or nonexistence of discriminatory intent in the negotiation or adoption of the new seniority system was not pertinent to the Committee's inquiry.

In *Stotts*, the Court held that the district court could not, over the objections of the city and the union, modify a consent decree to alter the existing seniority system, absent either an indication in the decree of an intention to depart from that seniority system or proof of the complaint's allegations of discrimination. Here, neither the company nor the union objected to the modification of their negotiated seniority system, and Consent Decree I explicitly dealt with seniority matters and gave the Committee authority to review any system negotiated by the company and the union. Moreover, as noted, the Committee's review was to pertain only to compliance with the decree, not to compliance with Title VII. Accordingly, there was no need for proof of any discriminatory intent. To impose a requirement that the Committee establish an independent violation of Title VII every time it conforms an agreement to the terms of the decree would be inconsistent with the basis of negotiated settlements, in which the parties give up their right to litigate in exchange for an agreed-upon judgment. See generally *Carson* v. *American Brands, Inc.*, 450 U.S. 79, 86-87 (1981); *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971).

requiring the use of plant seniority as the method of calculating seniority for all employees at the Mill. However, the decree specifically allows the adoption of seniority terms longer than plant continuous service. Indeed, the company and the union, in their July 1984 agreement, adopted the longer Fairfield Works service date for some employees. The Committee simply determined that, given the selectively applied longer seniority period that the company and the union had negotiated in lieu of plant seniority, the longer term should apply to all Mill employees, thereby guaranteeing all employees the equal benefit of their seniority. In addition, adoption of a plant seniority system under the circumstances would not have resolved the difficulties the company and the union were trying to resolve through the use of the longer seniority term.[5] The Committee's decision was a reasonable one and, as the courts below held, entirely consistent with the terms of the decree and the intent of the company and union.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1986

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[5] For example, it would not have addressed the concern that some employees initially reported to the Mill for training rather than for work (see R. 56). And it would have given numerous employees the same initial service date—coinciding with the opening of the plant—and therefore would not have been adequate in many cases in deciding between competing employees.

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